

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER REGARDING MOTIONS
FOR RECONSIDERATION,
SUMMARY JUDGMENT, AND FOR
THE COURT TO ACCEPT
PLAINTIFFS' SUPPLEMENTAL
RESPONSE WHEN CONSIDERING
SUMMARY JUDGMENT MOTION

This document relates to:

*Michael Skurow and Virginia
Emily Skurow v. Procter and
Gamble Pharmaceuticals, Inc.,
et al., No. 5-cv-379.*

I. INTRODUCTION

There are three motions pending before the court: (1) Defendant Elan Pharmaceuticals, Inc.'s ("Elan") motion for reconsideration of its motion to dismiss plaintiffs' amended complaint pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure; (2) Defendants Procter & Gamble Pharmaceuticals, Inc.'s and The Procter & Gamble Company's (collectively "P&G") motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure; and (3) Plaintiffs' motion for the court to accept plaintiffs' response to the January 23, 2006 minute entry when considering P&G's

1 summary judgment motion. Having considered the parties' briefs
2 filed in support of and opposition to the motions, the court
3 finds and rules as follows:

4 II. BACKGROUND

5 According to the amended complaint plaintiff Michael Skurow
6 allegedly ingested prescription medication containing
7 phenylpropanolamine ("PPA") on March 25, 1998 and thereafter
8 suffered a central retinal vein occlusion of the right eye.
9 Plaintiff and his wife commenced this action in the Circuit Court
10 of Orange County, Florida on November 15, 2004. The action was
11 removed to the United States District Court for the Middle
12 District of Florida, where motion practice resulted in the
13 dismissal of plaintiffs' complaint with leave to amend.
14 Thereafter, the complaint was amended and the matter was
15 transferred to Multi-District Litigation 1407 and this court on
16 March 8, 2005.

17 The amended complaint alleges direct claims of negligence
18 and strict liability, and derivative loss of consortium claims.
19 Specifically, plaintiffs aver that it had been well-documented
20 for many years prior to Mr. Skurow's stroke that PPA use is
21 associated with strokes, vascular injuries, and sudden elevations
22 in blood pressure. Plaintiffs further allege that the United
23 States Food & Drug Administration ("FDA") issued public health
24 statements advising consumers not to use PPA-containing products.
25 Plaintiffs claim that they did not discovered until the Spring of
26 2002 that Mr. Skurow's injury was caused by defendants'

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1 misconduct, when Mr. Skurow saw a lawyer's advertisement on
2 television.

3 Defendant Elan filed a motion to dismiss and defendant P&G
4 filed a motion for summary judgment. Both defendants contend that
5 plaintiffs' claims were barred by the expiration of Florida's
6 four-year statute of limitations. In addition, defendants contend
7 that the fraud and concealment allegations in the amended
8 complaint are not plead with particularity in accordance with
9 Rule 9(b) and should be dismissed. Lastly, defendants asserted
10 that plaintiff Virginia Skurow's allegations of lost consortium
11 fail because they are derived from her husband's time-barred
12 claims.

13 The court denied Elan's motion to dismiss, and Elan
14 subsequently filed a motion for reconsideration alleging that the
15 court incorrectly applied Florida law. Central to the motion for
16 reconsideration is whether plaintiffs should have known of the
17 risks associated with PPA on November 6, 2000, such that their
18 claims filed on November 15, 2004 are time-barred. The court
19 requested additional briefing on the specific issue of whether
20 the FDA public health advisory issued on November 6, 2000 should
21 have placed plaintiffs on notice that Mr. Skurow's stroke may
22 have been associated with PPA.

23 Plaintiffs request that the court consider their
24 supplemental response to the motion for reconsideration when
25 considering P&G's summary judgment motion. P&G requests that the
26 court strike plaintiff's supplemental response because it exceeds

1 the scope of the court's January 23, 2006 Minute Entry and
2 because the briefing on the motion for summary judgment is
3 closed.

4 III. DISCUSSION

5 A. Motion for Reconsideration Standard

6 "Motions for reconsideration are disfavored. The court will
7 ordinarily deny such motions in the absence of a showing of
8 manifest error in the prior ruling or a showing of new facts or
9 legal authority which could not have been brought to its
10 attention earlier with reasonable diligence." W.D. Wash. Loc.
11 Rule C.R. 7(h)(1); *Stairmaster Sports/Medical Products, Inc. V.*
12 *Pacific Fitness Corp.*, 916 F. Supp. 1049, 1054, 1057 (W.D. Wash.
13 1994).

14 B. An Issue of Material Fact Exists as to When Plaintiffs 15 Should Have Discovered the Cause of Mr. Skurow's Injury

16 Central to the motion for reconsideration is whether
17 plaintiffs should have known of the risks associated with PPA on
18 November 6, 2000, the date of the FDA public health advisory,
19 thereby making their claims filed on November 15, 2004 untimely.
20 Both defendants make essentially identical arguments, contending
21 that plaintiffs failed to rebut the evidence presented that Mr.
22 Skurow should have discovered, with the exercise of due
23 diligence, the alleged cause of his stroke more than four years
24 before plaintiffs filed suit.¹ Defendants assert that plaintiffs

25 ¹This evidence consisted of abstracts of television news
26 stories broadcast by the major television networks, as well as

1 did not raise a genuine issue of material fact as to their
2 constructive knowledge. Therefore, according to defendants, the
3 court should have ruled, as a matter of law, that plaintiffs'
4 claims were time-barred.

5 Plaintiffs respond that Mr. Skurow's uncontradicted
6 affidavits created the requisite issue of fact. The affidavits
7 establish that: (1) Mr. Skurow was not aware of the relationship
8 between PPA and strokes until the Spring of 2002; (2) he did not
9 see the November 6, 2000 FDA health advisory or resulting media
10 coverage; (3) he was not informed by his doctors that PPA may
11 have caused his stroke; and (4) he did not receive notification
12 from a manufacturer that PPA was a risk factor for strokes.

13 Plaintiffs also assert that this court cannot presume that
14 the publicity surrounding the November 6, 2000 health advisory
15 was sufficiently notorious to trigger Florida's statute of
16 limitations. Such a determination, plaintiffs contend, requires a
17 fact-intensive examination of the extent and reach of the
18 publicity, as well as an inquiry into plaintiffs' circumstances.
19 The court finds plaintiffs' argument persuasive.

20 In *O'Connor v. Boeing North America, Inc.*, 311 F.3d 1139
21 (9th Cir. 2002)² the Ninth Circuit considered the CERCLA and

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23 news stories from CNN.com, and newspapers in central Florida and
24 around the country, which reported the alleged link between PPA
use and stroke on or before November 6, 2000.

25 ²Plaintiffs cite *O'Connor* for the first time in their
26 response to the September 23, 2006 Minute Entry. Plaintiffs
request that the court consider their response when ruling on

1 California statute of limitations, both of which contain a
2 discovery rule identical to Florida's. The district court in
3 *O'Connor* had granted summary judgment on the basis that extensive
4 publicity about the carcinogenic nature of contaminants which
5 were released by the defendant in plaintiffs' communities
6 triggered constructive knowledge and the accrual of the discovery
7 rule. *Id.* at 1145. The circuit court reversed stating that "this
8 evaluation of the awareness in Plaintiffs' various communities of
9 a specific fact or event was uniquely an issue for the jury to
10 resolve." *Id.* at 1152. The court further stated:

11 This determination required a fact-intensive examination
12 of the geographic scope of the circulation of various
13 publications, the level of saturation of each publication
14 within the relevant communities, the frequency with which
15 articles on the Rocketdyne facilities appeared in each
16 publication, the prominence of those articles within the
17 publication, and the likelihood that a reasonable person
18 living in Plaintiffs' various communities at the same time
19 as Plaintiffs would have read such articles. These are all
20 factual questions unsuitable for summary judgment.

21 *Id.* (citing *Bibeau v. Pac. N.W. Research Found. Inc.*, 188 F.3d
22 1105, 1110 (9th Cir. 1999)) (holding "litany of news reports and
23 other public revelations" insufficient to sustain summary
24 judgment on the basis of statute of limitations because of the
25 factual nature of inquiry into plaintiff's exposure to articles,
26 the educational level of plaintiff, and whether there was reason

24 P&G's summary judgment motion. P&G objects arguing that the
25 response exceeds the scope of the minute entry. The court
26 disagrees. The response cites relevant case law that is
appropriate for this court to consider in ruling on the summary
judgment motion.

1 for concern about the effect of defendants' conduct on
2 plaintiff's health).

3 The court finds that defendants' attempts to distinguish
4 *O'Connor* and *Bibeau*, 188 F.3d at 1110 are unpersuasive. Before
5 public knowledge can be imputed to plaintiffs in this case, a
6 fact-intensive inquiry must be made as to the extent and nature
7 of the PPA publicity. Important factors in this inquiry are the
8 geographic scope of the publicity, the saturation level of the
9 publicity, plaintiffs' potential exposure to the publicity, the
10 education level of plaintiffs, and plaintiffs physical abilities.
11 Such a fact-intensive inquiry is the domain of the jury.³
12 *O'Connor*, 311 F.3d at 1152, *see also*, *Schetter v. Jordan*, 294
13 So.2d 130, 131 (Fla. 4th DCA 1974) (stating "when one, by the
14 exercise of due diligence, should have discovered the cause [of
15 his injury], is to be determined by the trier of fact and not by
16 the court in a summary proceeding"); *Hart v. Hart*, 234 So.2d 393,
17 396 (Fla 1st DCA 1970) (holding that when plaintiff should have
18 discovered defendant's deceit was a question of fact for the
19

20 ³Defendants claim that plaintiffs "admitted" to being put on
21 notice of their potential claims by the November 6, 2000 FDA
22 health advisory. Defendants cite plaintiffs' opposition to P&G's
23 motion to dismiss amended complaint in which plaintiffs state
24 they "filed their claim on November 15, 20004, which was within
25 the four years from the date on which the [FDA] issued its Public
26 Health Advisory, advising the consuming public for the first time
about the risks of PPA and hemorrhagic stroke." Pls.' Resp. At 8
(Docket No. 26). Defendants read too much into this statement.
Plaintiffs state that they filed within four years of the FDA
health advisory, they do not state that the date of the advisory
is the trigger date for Florida's limitations period.

1 jury).

2 Defendants assert that the court misconstrued Florida law
3 when it held that the issue of when an individual is placed on
4 constructive notice is an issue for the trier of fact and not a
5 court in a summary proceeding.⁴ Defendants cite several cases in
6 which Florida courts ruled in summary proceedings that
7 plaintiffs' claims were time-barred. However, these cases are
8 factually distinct from the present case. For instance, in
9 *Steiner v. Ciba-Geigy Corp.*, 364 So.2d 47 (Fla. 3d DCA 1978),
10 *cert. denied*, 373 So.2d 46 (Fla. 1979) the facts established that
11 plaintiff "confirmed for himself that there was a relationship
12 between his [injury] and the [product he ingested]," *Steiner*, 364
13 So.2d at 50, and in *Byington v. A.H. Robins Co., Inc.*, 580 F.
14 Supp. 1513 (S.D. Fla. 1984) plaintiff's doctor specifically
15 expressed to plaintiff his suspicion that defendant's product
16 caused plaintiff's injuries. *Byington*, 580 F. Supp. at 1516.⁵ The

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18 ⁴Defendants make much of the fact that *Edwards v. Ford*, 279
19 So.2d 851 (Fla. 1973) was receded from in *Perez-Abreu, Zamora &*
20 *De La Fe, P.A. v. Taracido*, 790 So.2d 1051 (Fla. 2001). However,
the limited holding for which the court cited *Edwards* was not
receded from and remains good law.

21 ⁵Elan also cites *Nardone v. Reynolds*, 333 So.2d 25 (Fla.
22 1976), *Doe v. Cutter Biological*, 813 F. Supp. 1547 (M.D. Fla.
23 1993), and *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla.
24 1991). In each of these cases the cause of plaintiffs' injuries
was addressed in the medical records and/or by plaintiffs'
25 physicians. The court imputed this knowledge to plaintiffs and
determined each of their claims was time-barred. In the present
26 case, the parties do not allege that Mr. Skurow's medical records
and/or physicians linked his stroke to the PPA-containing
products he ingested. To the contrary, Mr. Skurow claims that his

1 record in the present case lacks such evidence. It is Mr.
2 Skurow's uncontradicted statement that his doctors did not link
3 PPA to his stroke. Nor has any evidence been presented to the
4 court that such a link is contained in his medical records.⁶

5 C. The Fraud Allegations in the Amended Complaint Do Not
6 Satisfy Rule 9(b)'s Particularity Requirement⁷

7 Rule 9(b) of the Federal Rules of Civil Procedure requires
8 that "[i]n all averments of fraud...the circumstances
9 constituting fraud...shall be stated with particularity."
10 Fed.R.Civ.P. 9(b). Averments of fraud must be specific enough to
11 give defendants notice of a particular misconduct they are
12 charged with so they can defend against the charge. To that end,
13 plaintiffs must plead facts as to time, place and substance of
14 the defendant's alleged fraud, specifically the details of the
15 defendant's allegedly bad acts, when they occurred and who
16 engaged in them. *See, e.g., Bosse v. Crowell Collier and*

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18 physicians did not raise PPA as a possible cause of his stroke
19 when he discussed the issue with them in 1998.

20 ⁶There are other gaps in the record. For instance, the
21 record is not clear as to plaintiffs' whereabouts on November 6,
22 2000 or thereafter, whether plaintiffs watch television or read
the newspaper, or whether Mr. Skurow's physical injury affects
his ability to watch television and read. The court is also
unaware of plaintiffs' educational levels.

23 ⁷It has come to the court's attention that it inadvertently
24 failed to rule on Elan's request that the court dismiss the fraud
25 allegations in the amended complaint pursuant to Rule 9(b) of the
Federal Rule of Civil Procedures, as well as, its request that
26 the court dismiss Mrs. Skurow's loss of consortium claims in the
November 8, 2005 Order denying Elan's motion to dismiss.

1 *MacMillan*, 565 F.2d 602, 611 (9th Cir. 1977) (explaining that mere
2 conclusory allegations of fraud will not suffice under Rule 9(b),
3 and that statements of time, place and nature of the alleged
4 fraudulent activities will); *Monge v. Smyth*, 229 F.2d 361, 366
5 (9th Cir. 1956), *cert. denied, appeal dismissed*, 351 U.S. 976
6 (1956) (noting that fraud must be clearly alleged and that
7 allegations in the form of conclusions of the pleader as to the
8 existence of fraud are insufficient).

9 Plaintiffs admit that the amended complaint does not allege
10 a "formal fraud count." See Plaintiffs' Resp. Sum. Judg. Mot., p.
11 6. The amended complaint states three counts—strict liability,
12 negligence and loss of consortium. However, to the extent
13 plaintiffs allege fraud and concealment, the averments do not
14 satisfy Rule 9(b)'s "particularity" requirement. In paragraph 5
15 of the amended complaint, plaintiffs assert that the defendants'
16 fraudulent misrepresentations, conspiracy and concealment of the
17 facts would be "more specifically alleged below." However,
18 plaintiffs fail to set forth any allegations anywhere in the
19 amended complaint regarding fraud or other intentional conduct
20 that would satisfy Rule 9(b). Plaintiffs have done nothing more
21 than make conclusory and undifferentiated assertions that all
22 defendants concealed information about the allegedly harmful
23 affects of PPA. Accordingly, plaintiffs' fraud allegations are

1 dismissed with prejudice.⁸

2 D. Mrs. Skurow's Loss of Consortium Claims

3 Defendants move to dismiss Mrs. Skurow's loss of consortium
4 claims because they derive from Mr. Skurow's underlying
5 allegations. As discussed above, Mr. Skurow's claims remain
6 viable. As such, defendants' request to dismiss Mrs. Skurow's
7 derivative claims is denied. *Rosenthal v. Rodriguez*, 750 So.2d
8 703, 704 (Fla. 3d DCA 2000).

9 IV. CONCLUSION

10 1) Based on the foregoing, the court cannot determine, as
11 a matter of law, that on November 6, 2000, plaintiffs
12 had the requisite notice to trigger Florida's statute
13 of limitations.

14 2) Elan has failed to show manifest error in the court's
15 prior ruling, nor had Elan presented new facts or legal
16 authority. Therefore, the motion for reconsideration is
17 denied.

18 3) P&G has failed to demonstrate the absence of a genuine
19 issue of material fact. Therefore, for the reasons
20 discussed *supra*, P&G's motion for summary judgment is
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22 ⁸A motion to dismiss a claim pursuant to Rule 9(b) is the
23 functional equivalent of a motion to dismiss under Rule 12(b)(6).
24 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir.
25 2003). Ordinarily such dismissals are without prejudice. *Id.* at
26 1108. However, plaintiffs did not seek relief to amend the
complaint; moreover, plaintiffs have already had two
opportunities to correct the pleading deficiency. Accordingly,
the allegations are dismissed with prejudice.

1 denied.

2 4) The fraud and concealment allegations are not plead
3 with sufficient particularity as required by Rule 9(b)
4 of the Federal Rules of Civil Procedure and are
5 therefore dismissed with prejudice.

6 5) Mrs. Skurow's loss of consortium claims remain viable.
7 Therefore, defendants' motions to dismiss her claims
8 are denied.

9 6) Plaintiffs' motion for this court to accept plaintiffs'
10 supplemental response when considering P&G's summary
11 judgment motion is granted.

12 DATED at Seattle, Washington this 16th day of May, 2006.

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15 BARBARA JACOBS ROTHSTEIN
16 UNITED STATES DISTRICT JUDGE
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